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No. 90-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

KATHLEEN A. LAUGHLIN, Trustee,

Petitioner,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362 (1988), provides, in pertinent part, that the filing of a bankruptcy petition operates as a stay, applicable to all entities, of any act to obtain possession of, exercise control over, create, perfect, or enforce any lien against property of the bankruptcy estate. The Trustee is generally the individual statutorily charged under the Bankruptcy Code with administering the bankruptcy estate. The questions presented are:

1. Whether 11 U.S.C. § 362 (1988) should be construed so narrowly as to effectively preclude the Chapter 13 Trustee from bringing actions under the automatic stay provision of the Bankruptcy Code to protect property of the estate.

2. Whether funds held by a Chapter 13 Trustee for distribution to creditors under a confirmed Chapter 13 bankruptcy plan constitute property of the estate.

3. Whether a levy issued by the Internal Revenue Service upon the Chapter 13 Trustee in order to obtain funds of the debtor's bankruptcy estate constitutes an act to obtain property of the estate in violation of the automatic stay of such actions as set forth in 11 U.S.C. § 362(a)(3) (1988) and/or an act to create, perfect or enhance any lien against property of the estate in violation of the automatic stay of such actions as set forth in 11 U.S.C. § 362(a)(4) (1988).

QUESTIONS PRESENTED – Continued

4. Whether 26 U.S.C. § 7421(a) (1988), the so-called "Anti-Injunction Act" should be interpreted so broadly so as to preclude a court from preventing or remedying a violation by the IRS of the automatic stay provision of the Bankruptcy Code.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings of the court below were the Petitioner, Kathleen A. Laughlin, Trustee, and the Respondent, United States Internal Revenue Service.

Those parties whose interests and positions may be affected by this review should the funds levied upon be considered property of the estate are:

Michael J. and Dianne Elsken;
Donald D. Rutt;
Fred C. and Patricia Ress;
Pamela Marie Wolter.

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No. 90-

In The

Supreme Court of the United States

October Term, 1990

KATHLEEN A. LAUGHLIN, Trustee,

Petitioner,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

Petitioner, Kathleen A. Laughlin, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on August 15, 1990 in the above-captioned matter. Petitioner's request for a rehearing, and suggestion for rehearing en banc, was denied on September 25, 1990.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). The Bankruptcy Court's jurisdiction was

invoked pursuant to 28 U.S.C. § 1334 (1988) and 28 U.S.C. § 157(b) (1988).

OPINIONS BELOW

The decision of the Court of Appeals for the Eighth Circuit is reported at 912 F.2d 197 (8th Cir. 1990), and is reprinted as Appendix A. The order of the Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc is unreported, but is reprinted as Appendix B. The decision of the United States District Court, District of Nebraska, is reported at 98 Bankr. 494 (D. Neb. 1989), and is reprinted as Appendix C. The decision of the United States Bankruptcy Court, District of Nebraska, is reported at 98 Bankr. 490 (Bankr. D. Neb. 1988), and is reprinted as Appendix D.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 362 (1988), the automatic stay provision of the Bankruptcy Code, provides in relevant part as follows:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of –
>
> . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

> (4) any act to create, perfect, or enforce any lien against property of the estate; . . . "

11 U.S.C. § 362 (1988) is reprinted in its entirety as Appendix E.

11 U.S.C. § 1302 (1988), *Trustee*, provides as follows:

> (a) If the United States trustee appoints an individual under section 586(b) of title 28 to serve as standing trustee in cases under this chapter and if such individual qualifies under section 322 of this title, then such individual shall serve as trustee in the case. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as a trustee in the case.
>
> (b) The trustee shall –
>
> (1) perform the duties specified in sections 704(2), 704(3), 704(4), 704(5), 704(6), 704(7) and 704(9) of this title;
>
> (2) appear and be heard at any hearing that concerns –
>
> (A) the value of property subject to a lien;
>
> (B) confirmation of a plan; or
>
> (C) modification of the plan after confirmation;
>
> (3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act; and [*sic*]
>
> (4) advise, other than on legal matters, and assist the debtor in performance under the plan; and

(5) ensure that the debtor commences making timely payments under section 1325 of this title.

(c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections 1106(a)(3) and 1106(a)(4) of this title.

11 U.S.C. § 1306 (1988), *Property of the estate*, provides as follows:

(a) Property of the estate includes, in addition to the property specified in section 541 of this title –

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

26 U.S.C. § 7421(a) (1988), *Prohibition of Suits to Restrain Assessment or Collection*, provides as follows:

(a) TAX – Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any

court by any person, whether or not such person is the person against whom such tax was assessed.

(b) LIABILITY OF TRANSFEREE OR FIDUCIARY – No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of –

(1) the amount of liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of any such tax.

STATEMENT OF THE CASE

Kathleen A. Laughlin (hereinafter the "Trustee") is the standing Chapter 13 Trustee for the District of Nebraska. In 1989, an average of 100 new cases were filed each month and the Trustee is currently administering approximately 3,000 such cases involving payments to approximately 100,000 creditors. In order to assist the Trustee in handling this case load, she employees nine full time individuals and uses both manual and contract data processing.

On January 5, 1988, the Trustee received a computer-generated "Notice of Levy" dated December 29, 1987, showing a levy by the United States Internal Revenue Service (hereinafter the "IRS") upon funds alleged by the IRS to be payable to it by Michael J. Elsken and Dianne T. Elsken. Although the levy did not so indicate, the Trustee was able to determine through a manual search of her

records that the levy applied to attorneys fees earned by Michael J. Elsken in his capacity as debtor's counsel in the following three separate Chapter 13 bankruptcy actions: *In re: Donald D. Rutt, Debtor,* BK No. 87-01067; *In re: Fred C. Ress and Patricia Ress, Debtors,* BK No. 87-02424; and *In re: Pamela Marie Wolter, Debtor,* BK No. 87-40322.

In two of the cases (*In re: Donald D. Rutt, Debtor,* and *In re: Fred C. Ress and Patricia Ress, Debtors*), a confirmed Chapter 13 plan called for payment of attorneys fees to Mr. Elsken as an administrative expense of the debtor's bankruptcy estate. However, the administrative expense for the payment of the debtor's counsel's fees had not yet been paid in either of these cases when the Trustee received the Notice of Levy. As to the debtor Pamela Marie Wolter, there was no order confirming a Chapter 13 plan at the time the IRS levy was issued. The parties subsequently stipulated that the levy would not be effective with respect to Pamela Marie Wolter since the Chapter 13 plan was then unconfirmed.

On January 12, 1988, the Trustee filed a "Motion to Enforce 11 U.S.C. § 362." The Trustee sought enforcement of the automatic stay and an order finding that the IRS violated the stay by levying upon funds held by the Trustee in each of the three separate bankruptcy actions. The Trustee asserted that the automatic stay provided by 11 U.S.C. § 362 (1988) applies to all funds of a Chapter 13 estate, including those for administrative expenses, and continues until a bankruptcy case is dismissed or closed. As a result, the Trustee claimed that the levy served upon her by the IRS violated the automatic stay.

The Bankruptcy Court's Opinion

The United States Bankruptcy Court for the District of Nebraska overruled the Trustee's motion. The Court identified the core statutory issue as whether the post-confirmation funds held by or to be paid to the Trustee were property of the estate. To answer that question, the court, while acknowledging a split in other bankruptcy courts on this issue, chose to follow that line of cases holding that confirmation of the bankruptcy plan vests all property of the Chapter 13 estate in the debtor, thereby terminating the estate. From this, the Bankruptcy Court concluded that since those funds held by the Trustee post-confirmation were not property of the estate, the IRS levy on such funds did not violate 11 U.S.C. § 362 (1988), since that provision only applies to protect "property of the estate."

The Bankruptcy Court also concluded that the Trustee's action was an attempt to enjoin IRS assessment and collection efforts, and that 26 U.S.C. § 7421(a) (1988), the "Anti-Injunction Act", prohibited the Trustee from bringing such an action.

The District Court's Opinion

The United States District Court for the District of Nebraska affirmed the opinion of the Bankruptcy Court. The District Court reasoned that the language of 11 U.S.C. § 1327(b) (1988) specifically provides for vesting of all the property of the estate in the debtor upon confirmation of the Chapter 13 plan, except as otherwise provided

in the plan or order confirming the plan. The responsibility of the Trustee to administer these funds does not change this result.

The District Court also agreed that the Anti-Injunction Act precluded the Trustee's action in this case.

The Court of Appeals' Opinion

The Eighth Circuit, in a split panel decision, affirmed the judgment of the District Court. The majority, however, did not find it necessary to decide the issue of whether the property that the IRS sought to levy upon was property of the estate. Rather, the majority focused on what it perceived to be the purpose of 11 U.S.C. § 362 (1988) (the "automatic stay"). The Court concluded that this provision was only meant to protect "debtors, estates, and creditors". The majority then reasoned that since the IRS levy in this case did not affect debtors, estates, or creditors, the automatic stay was not violated.

The majority also held that the Anti-Injunction Act did not provide a bankruptcy exception that would authorize the court to enjoin IRS collection efforts in bankruptcy cases.

The dissent, however, rejected the majority's inquiry into the underlying purpose of 11 U.S.C. § 362 (1988). The dissent reasoned that under fundamental rules of statutory construction, where the language of the statute is clear, the only function of the court is to enforce the statute. The dissent identified the same core statutory issue that was dealt with by the courts below: Are funds held by the Trustee property of the estate?

The dissent concluded that *Resendez v. Lindquist*, 691 F.2d 397 (8th Cir. 1982) is binding authority in the Eighth Circuit for the proposition that the funds upon which the IRS sought to levy upon in this case are property of the estate. *Resendez* aside, the dissent found as more persuasive that line of bankruptcy court cases which have held that property, to be used for the execution of the confirmed Chapter 13 plan, does not revest in the debtor, but instead remains property of the estate (subject to the protection of the automatic stay) post-confirmation. The dissent reasoned that this result was more consistent with debtor rehabilitation, the major underlying policy goal of Chapter 13.

Given the fact that the funds held by the trustee post-confirmation are property of the estate, the dissent concluded that the plain meaning of 11 U.S.C. § 362 (1988) compelled a finding that the IRS violated the automatic stay. Furthermore, the dissent concluded that the Anti-Injunction Act did not bar this action to enforce the automatic stay.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve The Scope Of The Automatic Stay Provision Of The Bankruptcy Code.

The linchpin of the Bankruptcy Code is 11 U.S.C. § 362 (1988), the automatic stay provision. Upon the filing of a bankruptcy, it is this provision that affords the debtor protection from creditors, allowing for breathing space with which to determine the best and most effective way

to deal with creditors. See H.R. 95-595, 95th Cong., 1st Sess. 340-2 (1977); S. 95-989, 95th Cong., 2d Sess. 49-51 (1978). Therefore, any opinion, especially an appellate court decision, which has the practical effect of narrowing or limiting the scope of the automatic stay has the potential of fundamentally impacting the entire bankruptcy system.

The Trustee respectfully submits that the opinion of the Eighth Circuit in this case dangerously narrows the application of 11 U.S.C. § 362 (1988). While recognizing that a purpose of the automatic stay is to protect debtors, creditors, and the estate (by preserving the assets of the debtor for repayment), the Court of Appeals failed to take into account the mechanics of a Chapter 13 bankruptcy and the protections afforded by the automatic stay.

Briefly stated, 11 U.S.C. § 1302 (1988) provides that the trustee is to administer the bankruptcy estate. Since one of the purposes of the automatic stay is to protect the bankruptcy estate, and since the trustee is statutorily charged with administering that estate, it cannot be reasonably maintained that the automatic stay does not allow the trustee to protect the estate under 11 U.S.C. § 362 (1988) when administering those funds. Nevertheless, the practical effect of the lower court's opinion is to narrow the protection of the automatic stay, as it applies to the bankruptcy estate, because the individual in charge of administering the estate will not have the ability to protect the estate from attempted violations of the automatic stay.[1]

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[1] The Court of Appeals opinion also creates an anomalous situation in Chapter 11 bankruptcy cases. Under this opinion, a

(Continued on following page)

Further, a Chapter 13 debtor has the absolute right, post-confirmation, to request conversion of the Chapter 13 bankruptcy to a case under Chapter 7 [11 U.S.C. § 1307(a) (1988)], request dismissal of the case [11 U.S.C. § 1307(b) (1988)], or request modification of the Chapter 13 plan [11 U.S.C. § 1329(a) (1988)]. An obvious consequence of an IRS levy on post-confirmation funds in the hands of the Chapter 13 Trustee would be to potentially impair a debtor's ability to exercise these statutorily granted options. *See Laughlin v. United States Internal Revenue Service*, 912 F.2d 197, 203 (8th Cir. 1990) (Magill, J., dissenting).

Additionally, because the IRS is the party seeking assets in this case, under the Eighth Circuit analysis the Anti-Injunction Act would eliminate the ability of any party to object to the IRS action. Thus, no determination as to whether the property the IRS seeks to levy upon constitutes "property of the estate" under the Bankruptcy Code could ever be maintained in cases such as this. Congress could not have intended this circumvention of fundamental bankruptcy law.

The adverse impact on Chapter 13 bankruptcies demonstrated above is not limited to the present case, but, instead, potentially affects every current and future bankruptcy trustee and every bankruptcy now and hereafter filed throughout the United States. Therefore, this Court

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debtor-in-possession would apparently have the ability to contest violations of the automatic stay (since, according to the Eighth Circuit, debtors are protected by 11 U.S.C. § 362) but if an independent trustee is subsequently appointed, that trustee would have no ability to contest the identical violation. This simply cannot be the correct result.

should grant *certiorari* to resolve the important bankruptcy questions presented.

II. The Court Should Decide The Function Of Lower Courts When Interpreting The Plain Language Of The Automatic Stay Provision Of The Bankruptcy Code.

The Court of Appeals erred fundamentally by focusing on *who* was levied upon rather than *what* was being levied upon. This error was fundamental because the plain language of the relevant provisions of the automatic stay, 11 U.S.C. § 362(a)(3) (1988) and 11 U.S.C. § 362(a)(4) (1988), protect property of the estate without regard to who possesses the property. Once the trustee is able to identify the funds that the IRS seeks to levy upon (i.e. post-confirmation funds held by the bankruptcy trustee), the focus must then be on whether these funds constitute property of the estate within the meaning of 11 U.S.C. § 1306 (1988).

Recently, this Court had the opportunity to interpret a different provision of the Bankruptcy Code, 11 U.S.C. § 506(b) (1988), in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed. 2d 290 (1989). This Court began its inquiry as to that Bankruptcy Code section by reading the statutory language. This Court then followed the long established rule that the plain meaning of the statute should prevail absent evidence that such an interpretation would "contravene the intent of the Code's framers." 109 S.Ct. at 1027. Here, the Eighth Circuit apparently disagrees with this rule and instead has substituted its own views in place of the plain language of the Bankruptcy Code.

The provisions of 11 U.S.C. § 362 (1988) clearly apply to all entities and specifically stay certain acts to obtain property of the estate. Thus, consistent with the reasoning of *Ron Pair Enterprises, Inc.*, the lower court should have analyzed (1) whether the IRS is an entity within the meaning of 11 U.S.C. § 362 (1988), (2) whether a levy is an act to obtain possession of property of the estate, and (3) whether the funds the IRS sought to levy upon are property of the estate. Instead, the Court of Appeals bypassed a reading of the statute and immediately looked to what it mistakenly perceived to be the intent of the drafters of the Code. This is clearly improper, and this Court should grant *certiorari* to make it clear that fundamental rules of statutory construction apply to the entire Bankruptcy Code so that courts will not be apt to delve into the arena of amending statutes.

III. The Court Should Resolve The Conflict Among The Bankruptcy And District Courts As To Whether The Chapter 13 Estate Continues To Exist After Confirmation Of The Bankruptcy Plan.

As previously stated, the automatic stay provision of the Bankruptcy Code stays certain acts to obtain property of the estate. This provision is essential in that it affords the debtor breathing space to restructure the debtor's affairs in order to pay creditors in part or in full.

The law is unsettled as to whether this situation somehow changes once the debtor's bankruptcy plan is confirmed. Some courts hold that upon confirmation, the bankruptcy estate is extinguished and all the property revests in the debtor. See *In re Petruccelli*, 113 Bankr. 5 (Bankr. S.D.Cal. 1990) (citing with approval the District

Court opinion herein); and *In re Mason*, 45 Bankr. 498, (Bankr. D.Or. 1984) *aff'd*, 51 Bankr. 548 (D.Or. 1985). Under this analysis, the automatic stay cannot apply post-confirmation since property of the estate no longer exists.

Other courts have held that property necessary to execute the confirmed Chapter 13 plan remains property of the estate. Only that property in excess of the amount needed to carry out the plan, which is acquired by the debtor before or after confirmation, revests in that individual. See *In re Aniero*, 72 Bankr. 424 (Bankr. S.D. Cal. 1987); *In re Root*, 61 Bankr. 984 (Bankr. D. Colo. 1986); *In re Adams*, 12 Bankr. 540 (Bankr. D. Utah 1981).

While this distinction may at first blush seem technical, the reverberations are important, and are perhaps best illustrated by the dissenting opinion in the present case:

> Section 362(a)'s automatic stay of acts against property of the estate continues until such property is no longer property of the estate, § 362(c)(1), and bars any attempt to proceed against property of the estate regardless of whether the claim arose pre- or postpetition. The stay of acts against the debtor or property of the debtor continues until the case is closed or dismissed, or a discharge is granted or denied. § 362(c)(2). However, it does not prohibit acts to enforce claims that arose postpetition. § 362(a). Thus, if the Chapter 13 estate ceases to exist upon confirmation and all property of the estate becomes property of the debtor, then the automatic stay would not protect property essential to successful completion of a confirmed plan from postpetition claims. Nor would it prevent postconfirmation actions against that property by the IRS or other entities

> to enforce claims against plan creditors. Such a result is contrary to debtor rehabilitation, a major policy goal of Chapter 13. *See, In re Schewe*, 94 B.R. 938, 945 (Bankr. W.D. Mich. 1989). As one bankruptcy court has put it, "a debtor who is making his best financial effort to pay all of his creditors equally under a Chapter 13 Plan should not have his scarce resources and 'property of the estate' invaded and the Plan doomed to failure because of a claim from an upstart postpetition creditor." *In re Clark*, 71 B.R. 747, 750 (Bankr. E.D. Pa. 1987).

912 F.2d at 202.

Simply stated, if a debtor's postpetition property, which is earmarked to pay bankruptcy creditors, can instead be seized by postpetition creditors, the likelihood of successful completion of a Chapter 13 bankruptcy plan is severely diminished.

This Court should grant *certiorari* because of the great impact of this issue nationwide and resolve the apparent confusion caused by the conflicting decisions in this area.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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December 10, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-1598

Kathleen A. Laughlin, Trustee,
Appellant,

v.

United States Internal Revenue Service,
Appellee.

* * *

Kathleen A. Laughlin, Trustee,
Appellant,

v.

United States Internal Revenue Service,
Appellee.

* * *

Kathleen A. Laughlin,
Appellant,

v.

United States Internal Revenue Service,
Appellee.

Appeal from the United States District Court for the District of Nebraska.

Submitted: February 12, 1990
Filed: August 15, 1990

Before WOLLMAN and MAGILL, Circuit Judge, and BOGUE,* Senior District Judge.

WOLLMAN, Circuit Judge.

Kathleen A. Laughlin appeals from the district court's[1] order denying her motion to enforce the automatic stay of 11 U.S.C. § 362 against the Internal Revenue Service (IRS), which issued a notice of levy to Laughlin in her capacity as trustee of Chapter 13 bankruptcy estates for the District of Nebraska. We affirm.

I.

Seeking funds from which to satisfy the Elskens' tax liability, the IRS served Laughlin with a notice of levy upon funds payable to Michael J. Elsken and Deanne Elsken from Chapter 13 estates Laughlin administers. Because the levy did not refer to any specific bankruptcy actions, Laughlin made a manual search through her records of the approximately 1,700 cases she was administering at the time. She determined that the levy applied

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* The HONORABLE ANDREW W. BOGUE, United States Senior District Judge for the District of South Dakota, sitting by designation.

[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

to three separate bankruptcy actions in which debtors owed attorney fees to Michael Elsken.

Two of the estates in which Laughlin found funds subject to the levy had confirmed plans providing for payments to Michael Elsken. The IRS later agreed that the levy would not be effective against the estate of the third debtor, for which there was not yet a confirmed plan.

Laughlin filed a motion in the bankruptcy court to enforce the Bankruptcy Code's automatic stay. The bankruptcy court[2] denied Laughlin's motion. The district court affirmed the denial. Laughlin appeals, asking that we find that the IRS willfully violated the automatic stay and that we order reimbursement from the government for costs and attorney's fees.

II.

The district court held that the IRS levy did not violate the automatic stay of section 362 and upheld the bankruptcy court's ruling that 26 U.S.C. § 7421(a), the Anti-Injunction Act of the Internal Revenue Code, barred the entry of an order requiring the IRS to provide more detail in the notice of levy or to file an adversary proceeding before filing a notice of levy.[3]

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[2] The Honorable Timothy J. Mahoney, Chief Judge, United States Bankruptcy Court for the District of Nebraska.

[3] Section 7421(a) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax is assessed."

We agree with the bankruptcy court and the district court that the IRS has not violated the automatic stay in this case.[4] The debtors, estates, and creditors – those entities the automatic stay is designed to protect – are unaffected by the levy. *In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985) (the "automatic stay gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment"); *see also H & H Beverage Distrib. v. Department of Revenue of Pa.*, 850 F.2d 165, 166 (3rd Cir.), *cert. denied*, 109 S. Ct. 560 (1988); *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986); *In re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988); *Pursiful v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987); 2 L. King, *Collier on Bankruptcy* ¶ 362.01, at 362-7 (15th ed. 1990). The IRS is simply levying on money each bankruptcy estate owes Michael Elsken, as determined and approved for payment by the bankruptcy court. The IRS levy no more interfered with the purposes of the automatic stay under these circumstances than it would have had the notice of levy been served upon the bank in which the estate checks were deposited had they been sent to and received by the Elskens in due course. It is really the administrative burden created by the notice of levy to which the trustee objects. As indicated below,

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[4] The bankruptcy and district courts found no violation of the automatic stay based on their view that funds held by a Chapter 13 trustee for distribution to creditors under a confirmed plan are vested in the debtor under 11 U.S.C. § 1327(b) and thus are no longer property of the estate subject to the automatic stay. Because we base our holding on a different ground, we do not consider or decide whether property remains in the bankruptcy estate after confirmation of a Chapter 13 plan.

we, like the bankruptcy court, do not minimize the extent of that burden.

We turn, then, to the question whether the Anti-Injunction Act bars Laughlin's claim for relief from the levy.

Prior to the enactment of the current Bankruptcy Code, two circuits affirmed the right of the IRS to serve a notice of levy on a bankruptcy trustee in circumstances similar to Laughlin's. *In re Quakertown Shopping Center, Inc.*, 366 F.2d 95 (3d Cir. 1966), concerned a notice of levy the IRS served on a debtor's receiver to attach a taxpayer-creditor's claim against the bankruptcy estate. The court found the levy valid and enforceable, reasoning that the United States became, in effect, the involuntary assignee of the creditor and that the levy did not invade the jurisdiction of the bankruptcy court or interfere with the administration of the estate. *Id.* at 98. *See also In re Meter Maid Indus., Inc.*, 462 F.2d 436 (5th Cir. 1972) (adopting the reasoning of *Quakertown* on similar facts).

In *Bostwick v. United States*, 521 F.2d 741 (8th Cir. 1975), debtors who had already been discharged in bankruptcy sought to enjoin the IRS from collecting back taxes until the dischargeability of the tax debts was determined by the courts. The government had not filed proofs of claim during the course of the bankruptcy proceedings. We held that the Anti-Injunction Act did not bar the bankruptcy court from the entering an order enjoining the government from collecting the taxes. We concluded that Congress' enactment of a complete scheme governing bankruptcy proceedings overrode the general policy

represented by the Anti-Injunction Act. We based our conclusion on our belief that

> the overriding policy of the Bankruptcy Act is the rehabilitation of the debtor and we are convinced that the Bankruptcy Court must have the power to enjoin the assessment and/or collection of taxes in order to protect its jurisdiction, administer the bankruptcy's estate in an orderly and efficient manner, and fulfill the ultimate policy of the Bankruptcy Act.

Id. at 744.

In *A to Z Welding & Mfg. Co., Inc. v. United States*, 803 F.2d 932 (8th Cir. 1986), we held that the Anti-Injunction Act prohibited a suit by a corporation seeking to enjoin the IRS from collecting a penalty against its officers and shareholders for taxes withheld from the corporation's employees' wages but not paid over to the government. We found *Bostwick* inapposite because the tax sought to be collected had been assessed against officers and shareholders of the corporation in their personal capacity and not from the debtor in bankruptcy, as in *Bostwick*. 803 F.2d at 933. On similar facts, other courts of appeals have also held that the Bankruptcy Code does not override the Anti-Injunction Act. *In re American Bicycle Assoc.*, 895 F.2d 1277 (9th Cir. 1990); *In Matter of LaSalle Rolling Mills, Inc.*, 832 F.2d 390 (7th Cir. 1987); *United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986).

Finding no violation of the automatic stay, we conclude that the Anti-Injunction Act controls the outcome of this case. Congress has not provided a bankruptcy exception to the Anti-Injunction Act that would authorize a

court to enjoin IRS collection efforts in these circumstances. Nor does Laughlin's case fit into the narrow confines of *Bostwick*. This is not a situation in which the debtors thought themselves discharged of a debt for which the IRS had not filed a proof of claim during the bankruptcy proceedings. The IRS is seeking only to collect directly from the trustee that which the debtors owe the taxpayer-creditor according to the terms and conditions of confirmed Chapter 13 plans. Thus, our concerns in *Bostwick* about rehabilitation of the debtor and the orderly administration of the bankruptcy laws do not come into play. Moreover, because Laughlin does not dispute the validity of the tax, this case does not fit within the exception to the Anti-Injunction Act recognized by the Supreme Court in *South Carolina v. Regan*, 465 U.S. 367 (1984).

As the bankruptcy court recognized, the administrative burden of future levy notices that do not identify the property or even the debtors to which the levy applies is not a fanciful fear on Laughlin's part. Although it appears to us that the IRS could easily spare trustees the possibly enormous burden of sifting through hundreds or even thousands of cases, we have no basis here for dictating to the IRS the methods by which it may collect taxes. It is for Congress to impose upon the IRS the requirement of specifying the estates upon which the notice of levy is to apply or to create a bankruptcy exception to the Anti-Injunction Act.

Having found that the notice of levy did not violate the automatic stay provisions of section 362, we deny Laughlin's claim for costs and attorney's fees.

The district court's judgment is affirmed.

MAGILL, Circuit Judge, dissenting.

In holding that the IRS did not violate the automatic stay of 11 U.S.C. § 362, the majority disregards "the fundamental canon that statutory interpretation begins with the language of the statute itself." *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 110 S. Ct. 2126, 2130 (1990). Section 362(a) provides that a bankruptcy petition "operates as a stay, applicable to all entities, of . . . (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[5] The meaning of this language is plain: if the funds on which the IRS levied are property of the estate, then the IRS violated the automatic stay. Thus, as both the bankruptcy and district courts recognized, the critical issue in this case is whether funds held by a Chapter 13 trustee for distribution to creditors under a confirmed plan constitute property of the estate. The majority declines to even consider this issue, reasoning that the precise terms Congress used in § 362(a) are irrelevant because, in its view, the IRS levy does not interfere with the general purposes of the stay. It is not surprising that the majority cites no authority to support this radical departure from the recognized rules of statutory construction.[6] In a recent decision interpreting a different

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[5] The stay also applies to "any act to create, perfect, or enforce any lien against property of the estate." § 362(a)(4).

[6] In each of the cases cited by the majority involving an alleged violation of the Bankruptcy Code's automatic stay, the court first looked to the pertinent language of § 362 in order to

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Bankruptcy Code section, the Supreme Court emphasized that "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Because the majority refuses to enforce § 362(a) according to its terms, I must respectfully dissent. I would hold that the IRS violate the automatic stay because the funds on which it levied are property of the estate.[7] I would further hold that the Anti-Injunction Act, 26 U.S.C. § 7421(a), does not bar the trustee's action to enforce the stay.[8]

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decide the issue. Indeed, the treatise cited by the majority states that "the precise wording of the stay and its exceptions should be emphasized." 2 L. King, *Collier on Bankruptcy*, ¶ 362.04, at 362-34 (15th ed. 1990). It notes further that "[t]he stay of section 362 is extremely broad in scope and, aside from the limited exceptions of subsection (b), should apply to almost any type of formal or informal action against the debtor or the property of the estate." *Id.* at 362-32.

[7] The IRS argues that even if the funds are property of the estate, the levy constituted an action by a governmental unit to enforce its regulatory power and therefore falls under the exception to the automatic stay set forth in § 362(b)(4). The IRS fails to recognize that the § 362(b)(4) exception is expressly limited to those acts otherwise stayed by § 362(a)(1) and thus does not apply to the acts proscribed by § 362(a)(3), (a)(4). *See SEC v. First Fin. Group*, 645 F.2d 429, 437 (5th Cir. Unit A May 1981); *In re Ryan*, 15 B.R. 514, 519 (Bankr. D. Md. 1981).

[8] However, even if the IRS's violation of the stay was willful, we have no jurisdiction to grant the trustee's request

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I. Property of the Estate

In *Resendez v. Lindquist*, 691 F.2d 397, 398-99 (8th Cir. 1982), we held that undistributed funds in the possession of a Chapter 13 trustee after confirmation of the plan are property of the Chapter 13 estate. The trustee in *Resendez* was therefore required under 11 U.S.C. § 542(a) to turn over such funds to the Chapter 7 trustee when the debtors converted their case to Chapter 7. *Id.* at 398; *see also* Bankruptcy Rule 1019(5) (1987).[9] In addition, because

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for costs and attorney's fees under 11 U.S.C. § 362(h) because the federal government has not waived its sovereign immunity as to such relief. The only provision that could constitute a waiver in this case is 11 U.S.C. § 106(c). Based on the Supreme Court's decision in *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989), we have held that § 106(c) does not waive the federal government's sovereign immunity with respect to monetary awards. *Small Business Admin. v. Rinehart*, 887 F.2d 165, 169-70 (8th Cir. 1989). Contrary to the trustee's argument, the IRS may raise the issue of sovereign immunity for the first time on appeal. *Dewitt Bank & Trust Co. v. United States*, 878 F.2d 246, 246 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1318 (1990); *United States v. Johnson*, 853 F.2d 619, 622 n.7 (8th Cir. 1988).

[9] Some bankruptcy courts have concluded that 11 U.S.C. § 1326(a)(2), added to the Bankruptcy Code in 1984, now provides that undistributed funds held by a Chapter 13 trustee postconfirmation must be distributed to creditors in accordance with the plan upon conversion of the case. *See In re Milledge*, 94 B.R. 218, 219-20 (Bankr. M.D. Ga. 1988); *In re Waugh*, 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988); *In re Lennon*, 65 B.R. 130, 137-39 (Bankr. N.D. Ga. 1986). On its face, § 1326(a)(2) appears to apply only to funds that the trustee received prior to confirmation. More importantly, it is questionable whether

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the debtors had voluntarily paid the funds to the Chapter 13 trustee, we affirmed the denial of their claim for exemption of the funds from the Chapter 7 estate. *Id.* at 399. The only other circuit to address the issue has also concluded that undistributed funds held by a Chapter 13 trustee postconfirmation are property of the estate. *In re Nash*, 765 F.2d 1410, 1412, 1414 (9th Cir. 1985).

Our determination that the undistributed postconfirmation funds in *Resendez* were property of the Chapter 13 estate was in no way dependent upon the debtors' decision to convert their case. There is certainly nothing in the Bankruptcy Code which makes that determination in an ongoing Chapter 13 case contingent upon whether the debtor will or will not later choose to convert the case. Thus, because there is no principled basis on which to distinguish the holding in *Resendez*, this panel is bound to conclude that the funds on which the IRS levied are property of the estate.[10]

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this subsection mandates that the trustee continue distributing payments to creditors even after the debtor has converted the case. In any event, even if § 1326(a)(2) partially supersedes *Resendez* by requiring that undistributed postconfirmation funds be turned over directly to plan creditors, if certainly has no effect on *Resendez's* holding that such funds are property of the estate.

[10] *In re Lindberg*, 735 F.2d 1087 (8th Cir.), *cert. denied*, 469 U.S. 1073 (1984), does not permit us to reach a contrary conclusion. *Lindberg* simply held that in a case converted from Chapter 13 to Chapter 7, the date of conversion controls exemption eligibility. *Id.* at 1088. Although the *Lindberg* panel suggested in *dictum* that confirmation terminates the Chapter 13 estate

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Even if *Resendez* did not constitute binding authority in this case, I would still conclude that the funds at issue are property of the estate. 11 U.S.C. § 1306(a) provides that property of the Chapter 13 estate includes not only all of the debtor's property as of the time of petition, but also all property and earnings the debtor subsequently acquires prior to the time the case is closed, dismissed, or converted to another chapter. Section 1306(b) further provides that the debtor shall remain in possession of all property of the estate except as provided in a confirmed plan or confirmation order. On the other hand, 11 U.S.C. § 1327(b) states that the confirmation of a plan vests all of the property of the estate in the debtor except as otherwise provided in the plan or confirmation order. The apparent tension between § 1327(b) and § 1306(a)'s definition of the estate has led to a split in the bankruptcy courts on the question of whether the Chapter 13 estate continues to exist after confirmation of the plan. Some bankruptcy court decisions have held that unless the plan provides otherwise, confirmation vests all property of the Chapter 13 estate in the debtor, terminating the estate at that point. *See, e.g., In re Dickey*, 64 B.R. 3, 4 (Bankr. E.D.

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unless the plan provides otherwise, *id.* at 1089, it did not even discuss *Resendez*, let alone purport to overrule its holding that undistributed funds in the possession of a Chapter 13 trustee postconfirmation are property of the Chapter 13 estate. This holding can, of course, only be overruled by the court en banc. *See, e.g., Brown v. First Nat'l Bank*, 844 F.2d 580, 582 (8th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988). Furthermore, we have stressed that "[t]he doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction." *Cottrell v. Commissioner*, 628 F.2d 1127, 1131 (8th Cir. 1980) (en banc).

Va. 1985); *In re Mason*, 45 B.R. 498, 500-01 (Bankr. D. Or. 1984), *aff'd*, 51 B.R. 548 (D. Or. 1985). Others have held that property necessary for the execution of the plan's provisions remains property of the Chapter 13 estate and does not vest in the debtor. *See, e.g., In re Root*, 61 B.R. 984, 985 (Bankr. D. Colo. 1986); *In re Adams*, 12 B.R. 540, 541-42 (Bankr. D. Utah 1981); *see also Collier, supra* note 2, ¶ 1327.01 at 1327-5 (§ 1327(b) preserves "to the debtor ownership, as well as possession, of all property, whether acquired before or during the chapter 13 case, except as otherwise required to effectuate the confirmed plan") (footnotes omitted).[11] I find the latter line of cases more persuasive.

Besides § 1306(a), several other Bankruptcy Code sections indicate that the Chapter 13 estate remains in existence after confirmation of the debtor's plan. 11 U.S.C. § 704(9), made applicable to Chapter 13 by 11 U.S.C. § 1302(b)(1), requires the trustee to make a final report and file a final account of "the administration of the estate." 11 U.S.C. § 347(a) provides that ninety days after the final distribution in a case under Chapter 13, the trustee must stop payment on any check remaining unpaid and remit "any remaining property of the estate" to the court for disposal pursuant to Chapter 129 of Title 28. In addition, 11 U.S.C. § 345 authorizes the Chapter 13 trustee to deposit or invest "money of the estate," subject

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[11] *In re Aneiro*, 72 B.R. 424, 429-30 (Bankr. S.D. Cal. 1987), reached a similar result by holding that property which revests in the debtor at confirmation remains property of the estate, with the debtor's ownership rights limited at least to the extent that the property is committed to successful completion of the plan.

to specified restrictions that protect plan creditors from loss. If undistributed postconfirmation funds were not property of the estate, then the Chapter 13 trustee would not be bound by these restrictions when depositing or investing such funds pending distribution to creditors. Finally, 11 U.S.C. § 349(b)(3) states that unless the court orders otherwise for cause, dismissal of a Chapter 13 case "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." Based on this provision, the Ninth Circuit had held that a Chapter 13 trustee must return undistributed postconfirmation funds to the debtor when the case is dismissed. *Nash*, 765 F.2d at 1414.

Section 362(a)'s automatic stay of acts against property of the estate continues until such property is no longer property of the estate, § 362(c)(1), and bars any attempt to proceed against property of the estate regardless of whether the claim arose pre- or postpetition. The stay of acts against the debtor or property of the debtor continues until the case is closed or dismissed, or a discharge is granted or denied. § 362(c)(2). However, it does not prohibit acts to enforce claims that arose postpetition. § 362(a). Thus, if the Chapter 13 estate ceases to exist upon confirmation and all property of the estate becomes property of the debtor, then the automatic stay would not protect property essential to successful completion of a confirmed plan from postpetition claims. Nor would it prevent postconfirmation actions against that property by the IRS or other entities to enforce claims against plan creditors. Such a result is contrary to debtor rehabilitation, a major policy goal of Chapter 13. *See In re Schewe*, 94 B.R. 938, 945 (Bankr. W.D. Mich. 1989). As one

bankruptcy court has put it, "a debtor who is making his best financial effort to pay all of his creditors equally under a Chapter 13 Plan should not have his scarce resources and 'property of the estate' invaded and the Plan doomed to failure because of a claim from an upstart post-petition creditor." *In re Clarke*, 71 B.R. 747, 750 (Bankr. E.D. Pa. 1987). Although there are situations in which it may be difficult to identify precisely the property that is essential for execution of the plan, *see In re Petruccelli*, 113 B.R. 5, 16 (Bankr. S.D. Cal. 1990), it is clear that such property necessarily includes funds submitted by the debtor to the trustee for distribution to creditors under the plan. *See* 11 U.S.C. § 1322(a)(1) (a Chapter 13 plan must "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan"); *In re McCray*, 62 B.R. 11, 12 (Bankr. D. Colo. 1986) (after confirmation, "plan payments" remain property of the estate because they are "needed for execution of the plan").

Given that undistributed funds held by a Chapter 13 trustee postconfirmation are property of the estate, the plain language of § 362(a) requires a finding that the IRS violated the automatic stay. Our sole function is to enforce this language, unless we are presented with one of the " 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *Ron Pair Enterprises*, 109 S. Ct. at 1031 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Thus, contrary to the majority's view, the trustee need not show that the IRS levy interferes with the general purposes of the stay to prevail in

this case. Rather, in order to justify its refusal to enforce the plan language of § 362(a), the majority must point to "clear evidence that reading the language literally would thwart the obvious purposes" of the automatic stay. *Mansell v. Mansell*, 109 S. Ct. 2023, 2030 (1989).

The majority identifies absolutely no evidence that one of the obvious purposes of § 362(a) is to make it easier for entities to enforce claims against plan creditors by permitting them to proceed against property of the estate without first obtaining relief from the stay. There is, on the other hand, evidence in the Code that postconfirmation application of § 362(a) to such actions against estate funds held by the trustee would protect the interests of both the debtor and other creditors. At any time after confirmation, a Chapter 13 debtor has an absolute right to have the case dismissed, 11 U.S.C. § 1307(b), to convert the case to Chapter 7, § 1307(a), or to request modification of the plan, 11 U.S.C. § 1329(a). Thus, any one of these actions could be taken during a period in which the trustee is holding estate funds postconfirmation pending their later distribution to creditors in accordance with the plan. If the case is dismissed during this period, the trustee must return the estate funds to the debtor. *Nash*, 765 F.2d at 1414. If the case is instead converted to Chapter 7, the funds become part of the Chapter 7 estate, *Resendez*, 691 F.2d at 398-99, which may very well result in a different distribution of those funds among creditors. A different apportionment of the funds may also result from modification of the plan to reduce the level of payments to a particular class of creditors, § 1329(a)(1), or from modification to alter the amount of the distribution to a creditor who has received a payment

outside of the plan, § 1329(a)(3). Moreover, if the IRS is correct in contending that the circumstances of this particular case strongly favor enforcement of the levy, then there is no reason why it could not simply have requested and obtained relief from the stay under the provisions of § 362(d)-(g).

In sum, because there is no clear evidence that literal application of the plan and precise language of § 362(a) would thwart the obvious purposes of that section, I would hold that the IRS violated the automatic stay.

II. Anti-Injunction Act

Section 362(a) states that the automatic stay applies to all "entities." The definition of the term "entity" includes a "governmental unit," which in turn is defined as including a "department, agency, or instrumentality of the United States." 11 U.S.C. § 101(14), (26). Some of the exceptions to the stay listed in § 362(b) apply only to governmental units. Of particular note is § 362(b)(9), which excepts "the issuance to the debtor by a governmental unit of a notice of tax deficiency."

These statutory provisions leave no doubt that "[t]he IRS is subject to the automatic stay when engaged in tax collection activities." *In re Loughnane*, 28 B.R. 940, 941 (Bankr. D. Colo. 1983). There are numerous decisions finding that the IRS violated the stay. *See, e.g., United States v. Reynolds*, 764 F.2d 1004 (4th Cir. 1985); *United States v. Norton*, 717 F.2d 767 (3d Cir. 1983); *In re Lile*, 103 B.R. 830 (Bankr. S.D. Tex. 1989); *In re Carlsen*, 63 B.R. 706 (Bankr. C.D. Cal. 1986). Indeed, in some cases the IRS has conceded that it violated the stay. *See In re Academy*

Answering Serv., Inc., 100 B.R. 327, 329 (N.D. Ohio 1989); *In re Santa Rosa Truck Stop, Inc.*, 74 B.R. 641, 642 (Bankr. N.D. Fla. 1987); *see also In re Aurora Cord & Cable Co., Inc.*, 2 B.R. 342, 344 (Bankr. N.D. Ill. 1980) (noting that IRS "does not contest that it is subject to the automatic stay"). By contrast, there is apparently not a single reported case in which the IRS argued or the court held that the Anti-Injunction Act barred an action to enforce the automatic stay. In their decisions holding that the Bankruptcy Code contains no general exception to the Anti-Injunction Act, both the Fourth and Seventh Circuits intimated that the Act does not apply to a suit against the IRS to prevent or remedy a violation of the Code's automatic stay. *In re Heritage Village Church & Missionary Fellowship*, 851 F.2d 104, 105 (4th Cir. 1988) (per curiam); *In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 394 (7th Cir. 1987). Other decisions holding to the same effect have expressly indicated that the protection afforded by the automatic stay is not limited by the Act. *In re Heritage Village Church & Missionary Fellowship*, 87 B.R. 401, 403-05 (D.S.C.), *aff'd*, 851 F.2d 104 (4th Cir. 1988); *Cambridge Machined Prods. Corp. v. United States*, 58 B.R. 22, 25 (Bankr. D. Mass. 1985); *In re Idaho Agriquipment, Inc.*, 54 B.R. 114, 115 (Bankr. D. Idaho 1985); *In re Franklin Press, Inc.*, 46 B.R. 523, 525 (Bankr. S.D. Fla. 1985); *In re O.H. Lewis Co., Inc.*, 40 B.R. 531, 533-34 (Bankr. D.N.H. 1984).

Thus, the statutory language and case law make it abundantly clear that the Code's automatic stay provisions supersede the Act. In enacting § 362, Congress obviously intended that the courts would have jurisdiction to enforce the stay against the IRS. To conclude otherwise would effectively render the stay's express

applicability to the IRS meaningless. Accordingly, I would hold that the trustee's action to enforce the automatic stay is not barred by the Anti-Injunction Act.

For the reasons set forth above, I would reverse the district court's judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1598

Kathleen A. Laughlin, Trustee, Appellant, v. United States Internal Revenue Service, Appellee.	*	CV88-L-419 CV88-L-420 CV88-L-421
* * *	*	Appeal from the United States District Court for the District of Nebraska.
Kathleen A. Laughlin, Trustee, Appellant, v. United States Internal Revenue Service, Appellee.	*	
* * *	*	
Kathleen A. Laughlin, Appellant, v. United States Internal Revenue Service, Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 15, 1990

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT
MANDATE ISSUED 10/04/90

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1598NE

Kathleen A. Laughlin, Trustee,	*	
Appellant,	*	Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc
v.	*	
United States Internal Revenue Service,	*	
Appellee.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 25, 1990

Order entered at the direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KATHLEEN A. LAUGHLIN, Trustee,	)	CV88-L-419
	)	CV88-L-420
Appellant,	)	CV88-L-421
	)	
vs.	)	MEMORANDUM
	)	ON APPEAL
UNITED STATES INTERNAL REVENUE SERVICE,	)	
	)	
Appellee.	)	

The Chapter 13 Trustee for the District of Nebraska is Kathleen Laughlin. On January 5, 1988, Laughlin received a "Notice of Levy" from the IRS that required her to identify property that she held for the benefit of an individual who was later determined to be an attorney for three debtors whose plans are being administered by Laughlin. After manually searching her files, Laughlin discovered that the attorney was due fees in two cases that had been confirmed and that the attorney would be entitled to fees in the third case provided that the plan was confirmed. The parties have stipulated that the IRS's levy on the fees due from the debtor whose plan was unconfirmed is premature. Instead of responding to the IRS, Laughlin filed a motion for contempt and sanctions against the IRS in the bankruptcy proceedings and argued that by serving a notice of levy upon her, the IRS willfully violated the automatic stay provisions of 11 U.S.C. §362. (Code sections hereafter will be referred to

only be [sic] section.) The bankruptcy judge[1] denied her motion.

The central issue on appeal is whether, after a Chapter 13 plan is confirmed by the bankruptcy court, the presently undistributed and future property constitute "property of the estate" or "property of the debtor". The distinction is crucial because under section 362, "the stay of an act against property of the estate . . . continues until such property is no longer property of the estate." 11 U.S.C. §362(c)(1).

The bankruptcy judge found that section 1327(b) controls the effect that confirmation has on the property and he ruled that the money presently held by Laughlin and the money that Laughlin receives in the future for payment to creditors under the terms of a confirmed plan is not property of the estate. Thus, he found that the IRS had not violated section 362. Additionally, he refused to order the IRS to take any action designed to alleviate the burdens imposed upon the Trustee resulting from any future notice of levy because he found that any such order would constitute injunctive relief and the court is barred under 26 U.S.C. §7421(a) from granting injunctive relief against such actions by the IRS.

Two sections of the bankruptcy code apparently are at odds and are causing courts to reach different results when analyzing issues similar to the one presented in this appeal. Section 1327(b) states, "Except as otherwise provided in the plan or the order confirming the plan, the

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[1] The Honorable Judge Timothy Mahoney, bankruptcy judge for the District of Nebraska.

confirmation of a plan vests all of the property of the estate in the debtor."

In a line of cases that apparently began with *In re Stark*, 8 B.R. 233 (Bankr. N.D. Ohio 1981), courts have construed section 1327(b) to mean that after confirmation of a plan, no property of the estate remains unless otherwise stated in the plan. *See In re Mason*, 45 B.R. 498, 500 (Bankr. D. Ore. 1984); *In re Dickey*, 64 B.R. 3, 4 (Bankr. E.D. Va. 1985); *In re Walker*, 67 B.R. 811, 812, n.3 (Bankr. C.D. Calif. 1986) and *In re Walker*, 84 B.R. 888, 888 (Bankr. D.C. 1988). The *Mason* court explained:

> [T]he debtor remain[s] in possession of all of the property of the estate between the time of the filing of the petition for relief and the order of confirmation. Title to such property, however, remains in the estate and is subject to the control of the court. Upon confirmation, not only does the debtor have the right to possession of the property which was property of the estate, but he is then vested with title to the property of the estate. . . . No longer is disposition of the property (except as otherwise provided in the plan or the order) controlled by the court. While the debtor has the obligation to comply with the plan and failure to do so could result in dismissal or conversion to chapter 7, the debtor nevertheless may use, sell or lease the property within or outside the ordinary course of business without the necessity of notice and a hearing or order of the bankruptcy court.

Mason, 45 B.R. at 500. The courts have reasoned that creditors are not bound by the automatic stay with regard to any post-confirmation property not specifically mentioned in the plan since that property becomes property

of the debtor. This reasoning was adopted by the bankruptcy court.

The *Stark* and *Mason* courts' analysis presents no dilemma until section 1327(b) is attempted to be reconciled with section 1306, which defines property of the estate. In a line of cases, which are relied upon by the Trustee in the present dispute, courts have rejected the reasoning of *Stark* and its progeny and have interpreted 1327(b) in a manner intended to harmonize section 1327(b) with section 1306.

Section 1306, states:

a) Property of the estate includes, in addition to the property specified in section 541 of this title –

   (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

   (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

The leading case of this alternative approach is *In re Root*, 61 B.R. 984 (Bankr. D.Colo. 1986). The issue presented to the *Root* court was whether the IRS had violated

the section 362 stay by levying directly upon the debtor for all attorney fees then owed by the debtor to his attorney who was delinquent on the payment of his taxes. The *Root* court began its discussion by observing that under section 1306(a)(2), earnings from services performed by the Debtor post-petition are "property of the estate" and that under 1327(b), after confirmation, all "property of the estate" is vested in the debtor *unless* otherwise provided in the Plan." At this juncture, the *Root* court's analysis departs from *Stark* and its progeny.

The *Root* court relied upon a statement from *In re Adams*, 12 B.R. 540 (Bankr. Utah 1981), wherein the court stated: "Any property which has not been designated in the plan or order of confirmation as necessary for the execution of the plan, revests with the debtor." *Id.* at 542. The *Adams* court determined that section 1322(b)(9) permitted the plan to vest property of the estate in the debtor and that, even if the plan was silent, section 1327(b) revests the property of the estate in the debtor unless the plan otherwise provides. Thus, the court observed that the definition of property of the estate found in section 1306 is "pruned dramatically at confirmation." *Id.*

In addition to relying of [sic] the *Adams* court's reasoning, the *Root* court noted that section 704(9), made applicable to Chapter 13 trustees by section 1302, requires that the Trustee "make a final report and file a final account of the administration of the *estate* with the court." [emphasis added by the *Root* court.] The court reasoned that this task would be impossible to perform if the entire estate extinguished upon confirmation. The debtor in *Root* had made his payments for fees to his attorney

before he received the IRS's notice. The court noted that there was no evidence that the IRS was specifically seeking to levy on that portion of the property and earning [sic] which remained property of the estate post-confirmation, but concluded that if there had been such evidence, the court would have found that the IRS was in violation of the stay. *See also, In re Clark,* 71 B.R. 747 (Bankr. E.D. Pa. 1987) (adopting the reasoning of the *Root* court and expressly rejecting the *Mason* court's reasoning) and *In re Aneiro,* 72 B.R. 424 (Bankr. S.D. Cal. 1987) (holding that the clear language of section 1306 establishes that confirmation of a Chapter 13 plan is not relevant to determining whether property is or is not property of the estate).

A basic doctrine of statutory construction declares that where possible, two statutes must be read so as to give meaning to each statute. The courts that have followed the reasoning of *Adams* and *Root* indicate that both sections cannot be given meaning unless there is something known as "property of the estate" at the close, dismissal or termination of every bankruptcy case. I disagree.

I do not interpret the words, "Except as otherwise provided in the plan or order confirming the plan," to except all property mentioned in the plan from section 1327's rule that all property of the estate revests in the debtor. The language of the exception simply accommodates those debtors who utilize the option of vesting title to specific property to an entity other than himself or herself as part of the plan. *See* 1322(b)(9). If the debtor's plan does not have such a provision, then section 1306's provision explaining the life of property of the estate need not be invoked for that case. Such a result does not

render 1306 meaningless, only inoperative in particular cases. Additionally, that the trustee retains supervision and control "over monies and property committed to the plan" does not compel the result that such property be labeled "property of the estate" in contradiction to the debtor's title to and possession of the property.

I also agree with the bankruptcy judge's decision to refrain from ordering the IRS to perform any task that would simplify the trustee's administrative chores resulting from the receipt of a Notice of Levy based upon the Eighth Circuit's interpretation of the Anti-Injunction Act.

For these reasons, I shall affirm the bankruptcy judge's opinion of June 22, 1988.

Dated March 29, 1989.

BY THE COURT

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KATHLEEN A. LAUGHLIN, Trustee, Appellant,	)	CV88-L-419 CV88-L-420 CV88-L-421
vs.	)	ORDER
UNITED STATES INTERNAL REVENUE SERVICE, Appellee.	)	

For the reasons provided in the accompanying memorandum,

IT IS ORDERED that the bankruptcy court's opinion of June 22, 1988, is affirmed.

Dated March 29, 1989.

BY THE COURT

United States
District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: DONALD D. RUTT, FRED C. RESS and PATRICIA RESS, PAMELA MARIE WOLTER, DEBTOR(s) Plaintiff(s) vs. Defendant(s)	CASE NO. BK87-1067 BK87-2404 CH13 BK87-40322 JOURNAL ENTRY DATE: June 22, 1988 HRNG. DATE: DEPUTY: _____

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion by Trustee

APPEARANCES

Kathleen Laughlin, Attorney, Omaha Grain Exchange Bldg., Omaha, NE 68102

Rayford K. Adams, III, Attorney, P.O. Drawer X, Greensboro, North Carolina 27402

Howard N. Kaplan, Attorney, One Merrill Lynch Plaza, 10330 Regency Parkway Drive, Omaha, NE 68114

Loren B. Mark, Attorney, Tax Division, U.S. Dept. of Justice, Washington, D.C. 20530

Douglas R. Semisch, Ass't. U.S. Attorney, P.O. Box 1228 DTS, Omaha, NE

( ) Copy to Law Clerk

( ) SETTLED. No further action necessary.

( ) WITHDRAWN. No further action necessary.

(X) ORDERED;

( ) Taken under Advisement

( ) Sustained ( ) Overruled

(X) Motion by Trustee overruled. See Memorandum this date.

BY THE COURT:

Timothy J. Mahoney
Chief Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	CASE NO.
DONALD D. RUTT,	)	BK87-1067
	)	CASE NO.
FRED C. RESS and	)	BK87-2404
PATRICIA RESS,	)	CASE NO.
	)	BK87-40322
PAMELA MARIE WOLTER,	)	Chapter 13
DEBTORS	)	

MEMORANDUM

This matter has been submitted on stipulations and briefs. Howard Kaplan of Erickson & Sederstrom, P.C., Omaha, Nebraska, represents Kathleen Laughlin, Trustee. Loren Mark, Trial Attorney, Tax Division, U.S. Department of Justice, Washington, D.C., and Douglas R. Semisch, Assistant U.S. Attorney, Omaha, Nebraska, represent the Internal Revenue Service. Rayford K.

Adams, III, of Greensboro, North Carolina, represents the NACTT, amicus curiae.

Facts

Kathleen Laughlin is the duly appointed and acting Chapter 13 Trustee for the District of Nebraska appointed by this Court under the authority of 11 U.S.C. § 1302(d). As of this date, the United States Trustee system is not in effect in this judicial district. The Trustee currently is responsible for administering approximately 1700 Chapter 13 bankruptcy cases.

The Trustee is required by the Bankruptcy Code, Section 1302, to, among other duties, receive payments from debtors and/or debtors' employers, disburse payments to debtors' creditors pursuant to plans confirmed by the Court and account to debtors, creditors and the Court for all receipts and disbursemer ts.

During 1987 there were an average of seventy-five new cases filed each month with a range of one to three hundred forty-three creditors per case or an average of thirty-five creditors per case. For the total 1700 debtor caseload, the Trustee deals with a creditor base of 59,500 creditors over a period of three to five years.

The Trustee employs a staff of five and uses both manual and contract data processing to service the workload.

On January 5, 1988, the Trustee received a "Notice of Levy" from the Internal Revenue Service (IRS) dated December 29, 1987. The Notice of Levy requires the Trustee to determine if she holds any property for the

benefit of a particular individual, identified by name. Although the Notice of Levy does not so indicate, the individual taxpayer whose property has been levied upon is not a Chapter 13 debtor, but is an attorney for three debtors whose plans are being administered by the Trustee.

The Notice of Levy does not identify the particular Chapter 13 debtors from whom the taxpayer may expect payment. As a result, the Trustee interrupted the administrative processes, manually searched the records in her office and determined that two Chapter 13 plans had been confirmed in which payments were due the taxpayer and one Chapter 13 plan was pending confirmation, which, if eventually confirmed, would require the Trustee to distribute payments to the taxpayer.

Rather than respond to the Notice of Levy, the Trustee brought a motion before this Court requesting that the IRS be found to have violated the automatic stay of Section 362 of the Code.

The Trustee's theory, which is supported by the National Association of Chapter 13 Trustees (NACTT) in its amicus curiae brief is that money held by a Chapter 13 Trustee under a confirmed plan is property of the estate and that any attempt to collect such money from the Trustee can only be initiated after obtaining relief from the Court. In addition, the Trustee and NACTT argue that if the IRS is allowed to levy upon money held by the Trustee, such levy will create an administrative nightmare. Since the IRS Notice of Levy does not identify cases being administered by the Trustee to which the Trustee should look in determining the existence of taxpayer/

creditor funds, the Trustee is required to expend employee and financial resources to do the research which, according to the Trustee, should be the burden of the IRS. This research will take time, perhaps involve additional expenses for computer service, and may not result in an accurate determination by the Trustee. If the Trustee innocently, but inaccurately, accounts to the IRS, she may be personally liable for such inaccuracy.

Finally, the Trustee suggests that allowing the IRS to levy upon money the Trustee has a statutory and Court ordered duty to disburse to creditors of Chapter 13 debtors may put the Trustee in violation of the Bankruptcy Code and Court orders for complying with conflicting Internal Revenue Code and IRS collection orders (the Notice of Levy).

The taxpayer involved has been notified of this proceeding and has chosen not to participate. The funds discovered by the Trustee have been, pursuant to stipulation, deposited with the Clerk of the Bankruptcy Court pending resolution of this dispute.

The IRS resists the motion of the Trustee and urges this Court to find this action barred by 26 U.S.C. § 7421, the Anti Injunction Act. In addition, the IRS argues that the property held by the Trustee is not property of the estate, and even if it is, the automatic stay of the Bankruptcy Code does not bar the IRS from levying upon it.

Legal Conclusions and Analysis

Section 362 of the Bankruptcy Code prohibits any act to obtain possession of property of the estate or of

property from the estate or to exercise control over property of the estate. 11 U.S.C. § 362(a)(3).

Property of the estate for Chapter 13 purposes includes property specified in Section 541 of the Code plus earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under another title. 11 U.S.C. § 1306(a)(2).

The debtor is required to file a plan within a certain amount of time after filing the petition and, unless the Court orders otherwise, the debtor must begin to make payments to the Trustee, in the amount proposed by the plan, within thirty days after the plan is filed. 11 U.S.C. § 1326(a)(1).

The Trustee retains all such payments until the plan is confirmed. Upon confirmation, the Trustee distributes the payments in accordance with the plan. If the plan is not confirmed, the Trustee returns to the debtor the net balance after deducting certain allowed administrative claims. 11 U.S.C. § 1326(a)(2).

The Trustee's duty following confirmation is to pay the creditors. 11 U.S.C. § 1326(c).

Confirmation of the plan vests all of the property of the estate in the debtor free and clear of any claims of creditors provided for in the plan. 11 U.S.C. § 1327(b) and (c).

This Court concludes that after confirmation of a plan, the funds held by the Trustee and those funds which the Trustee receives in the future for payment to creditors under the terms of a confirmed plan, are not

property of the estate. Such funds are property of the debtor. *In re Mason*, 45 B.R. 498 (Bkrtcy. D. Ore. 1984), aff'd. 51 B.R. 548 (D. Ore. 1985) and *In re Stark*, 8 B.R. 233 (Bkrtcy. N.D. Ohio 1981). *Contra In re Root*, 61 B.R. 984 (Bkrtcy. D. Colo. 1986). The Trustee holds them only in her capacity as a disbursing agent. See HR Rep No. 95-595, 95th Cong, 1st Sess 430 (1977), Norton Bankr Code Pamphlet 1987-1988 Ed, 909.

The Bankruptcy Court in *Root*, although apparently believing that post-confirmation property was still property of an "estate", nevertheless suggested, in a fact situation such as the one before this Court, that the IRS should levy upon the Trustee, suggesting that, in contrast to a debtor, the Trustee being aware of the facts "will not initiate needless litigation in this court." 61 B.R. at 986.

If the funds being held by the Trustee are not property of the estate, it follows that a levy by the IRS on such funds is not a violation of the automatic stay of Section 362.

However, the Trustee additionally requests the Court to prohibit the IRS from attempting to obtain such funds from her unless the IRS specifies the debtor case or cases in which she is holding money for the taxpayer being levied upon. The Trustee and NACTT argue that the administrative burden upon the Trustee and the cost of the "blind records search" should not be borne solely by the Trustee or other creditors, but that the IRS should share such burden by at least doing sufficient research to give the Trustee some indication of where the funds are. The Trustee envisions another Notice of Levy in the future which will result in her office searching all the files

and determining numerous cases in which a taxpayer has a right to funds. She further suggests that the search burden could immobilize the office, thus interfering with the administration of the Chapter 13 Trust.

If [sic] is suggested that the solution to the above-described scenario is an order by this Court requiring the IRS to provide the Trustee with more detail. In the alternative, it is suggested that the Court should require the IRS to file an adversary proceeding against the Trustee and the taxpayer and perhaps the debtor so a Court can properly determine the rights of the IRS and the Trustee.

Section 7421(a) of the Internal Revenue Code, 26 U.S.C. § 7421(a), provides in applicable part:

> "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court by any person, whether or not such person is the person against whom such tax was assessed."

This statute is referred to as the Anti Injunction Act and was enacted by Congress as a jurisdictional limitation with respect to actions involving the assessment or collection of taxes by the IRS. See *Enoch v. Williams Packing and Navigation Co.*, 370 U.S. 1 (1962); *Bob Jones University v. Simon*, 416 U.S. 736 (1972); *MCA v. ABC, Inc.*, 715 F.2d 475, 476 (9th Cir. 1983). Its basic purpose is to prohibit any litigation which would enjoin IRS assessment and collection efforts. *MCA v. ABC, Inc., Id.*

This statute has been construed in a bankruptcy case under this Code and the Court concluded that Congress did not intend the Code to supersede the Anti Injunction Act, nor was the Code to be used to shield non debtors

from collection of taxes. *Cambridge Machine Products Corp. v. United States,* 55 B.R. 22 (Bkrtcy. D. Mass. 1985).

The Eighth Circuit Court of Appeals has ruled that the Anti Injunction Act prohibits a Bankruptcy Court from enjoining the IRS from collecting a tax assessed against non debtors. *A to Z Welding & Mfg. Co. Inc., v. United States,* 803 F.2d 932 (8th Cir. 1986).

The request by the Trustee to order the IRS to provide the Trustee more detail in future Notice of Levy served upon her or to require the IRS to file an adversary proceeding before serving such Notice of Levy are both requests in the nature of an injunction. This would involve the Court in judicial interference with the tax collecting function of the IRS on matters unrelated to debtors or property of the estate. Such actions by the Court are prohibited by the Section 7421(a).

The administrative burden forseen by the Trustee is very possibly real. However, it is to Congress and not this Court that she must look for relief.

The motion by the Trustee is overruled. The Clerk of the Bankruptcy Court shall distribute the funds now being held, plus accrued interest, to the Trustee for distribution.

Separate Journal Entry shall be filed.

DATED: June 22, 1988.

BY THE COURT:

Chief Judge

APPENDIX E

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay –

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers

property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [*sic*]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of the protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor

subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceedings of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) The stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2)

No. 90-917

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

KATHLEEN A. LAUGHLIN, TRUSTEE, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
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SHIRLEY D. PETERSON
Assistant Attorney General
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JOEL A. RABINOVITZ
Attorneys

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Washington, D. C. 20530
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QUESTION PRESENTED

Whether the United States may be enjoined from serving a notice of levy upon a bankruptcy trustee where the government seeks to obtain property that the bankruptcy court has, pursuant to a confirmed plan, ordered to be paid to an administrative claimant who is a delinquent taxpayer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 912 F. 2d 197. The opinion of the district court (Pet. App. 23-29) is reported at 98 Bankr. 494. The opinion of the bankruptcy court (Pet. App. 31-39) is reported at 98 Bankr. 490.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1990. A petition for rehearing was denied on September 25, 1990. Pet. App. 22. The petition for a writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 5, 1988, Kathleen A. Laughlin, a Chapter 13 trustee for the District of Nebraska (the trustee), was served with a notice of levy by the Internal Revenue Service to obtain all property or funds owed to Michael J. and Deanne Elsken. Pet. App. 2, 23. The levy was issued for the purpose of enforcing outstanding tax assessments against the Elskens. Pet. App. 2. Upon receiving the levy, the trustee searched her records and discovered three bankruptcy cases in which money was owed to Mr. Elsken (taxpayer) as administrative expenses authorized for his work as an attorney in those cases. Pet. App. 2-3. In two of the cases, the bankruptcy plans had been confirmed by the court and the payments were due Mr. Elsken; in the third, the plan had not been confirmed as of the date of the levy. Pet. App. 3. The parties agreed that the levy would not apply to the funds from the third case. *Ibid.*

2. The trustee moved the bankruptcy court to impose sanctions against the IRS for violating the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362.[1] The bankruptcy court denied the trustee's motion and held that the automatic stay was not violated. Pet. App. 39. The court concluded that when a Chapter 13 plan is confirmed, the trustee holds any property (including those amounts the trustee uses to pay the creditors and administrative expense claimants) only as a disbursing agent. Because the property to be disbursed by the trustee after plan confirmation is no longer property of the estate, the automatic stay provisions

---

[1] The parties agreed that, pending the outcome of this case, the trustee would pay to the bankruptcy court the monies due Mr. Elsken for which the IRS had served a levy. The IRS agreed not to take any additional collection actions against the trustee during the pendency of this action.

of the Bankruptcy Code do not apply, and the IRS therefore did not violate them. Pet. App. 36-37.[2]

3. The district court affirmed. Pet. App. 30. The court agreed that, after confirmation of a bankruptcy plan, the property revests in the debtor pursuant to 11 U.S.C. 1327(b), and the automatic stay is no longer applicable. The district court therefore ruled that the property upon which the IRS sought to levy was not property of the estate and that the IRS thus did not violate the automatic stay when it issued the levy. Pet. App. 28-29.

4. A divided panel of the court of appeals affirmed. The court noted that two other courts of appeals had previously affirmed the right of the government to levy on a bankruptcy trustee in similar circumstances, where the government's claim is asserted against a *creditor* rather than against the debtor. Pet. App. 5, citing *In re Meter Maid Industries, Inc.*, 462 F.2d 436 (5th Cir. 1972); *In re Quakertown Shopping Center, Inc.*, 366 F.2d 95 (3d Cir. 1966). The court held that, when the government's claim is not aginst the debtor, "the levy [does] not invade the jurisdiction of the bankruptcy court or interfere with the administration of the estate." Pet. App. 5. No violation of the automatic stay thus occurred. Pet. App. 6-7.

5. In dissent, Circuit Judge Magill stated that the case should be controlled by the terms of Section 362(a), which

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[2] The trustee had also requested the court to require the IRS either to provide the trustee with more information regarding the taxpayers upon whose property the IRS seeks to levy or to file adversary proceedings to determine its rights in the property. The court concluded that the Anti-Injunction Act, 26 U.S.C. 7421, prevented it from interfering with the manner in which the IRS collects the taxes owed it, at least where the IRS is not seeking to collect taxes owed by the debtor. Pet. App. 37-39. The court therefore denied the trustee's motion. This ruling was upheld on appeal. Pet. App. 7, 29. Petitioner does not seek review of this aspect of the decision of the courts below.

provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of * * * (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Pet. App. 9. He regarded the funds in the trustee's hands after confirmation as property of the estate and, therefore, protected by the stay. Pet. App. 12-15. He also concluded that Section 362 was intended to supersede the Anti-Injunction Act. Pet. App. 18.

ARGUMENT

The decision in this case is correct and is not in conflict with decisions of other circuits. The two other courts of appeals that have addressed this same question have reached the same conclusion reached here. There is, accordingly, no reason for further review.

1. Section 6331 of the Internal Revenue Code provides that the IRS may, to collect unpaid taxes, levy upon any property or rights to property belonging to the taxpayer. The Anti-Injunction Act, 26 U.S.C. 7421(a), provides that "[e]xcept as [otherwise] provided * * *, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." As this Court has recognized, the Act must be given a comprehensive effect to accomplish its primary objective of protecting the tax collection process from premature judicial interference pending a suit for refund. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7-8 (1962); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 12 (1974); *Bob Jones University* v. *Simon*, 416 U.S. 725, 736-737 (1974); *South Carolina* v. *Regan*, 465 U.S. 367, 386 (1984) (O'Connor, J., concurring in the judgment). Were this not a bankruptcy case, there would obviously

be no doubt that the IRS could levy upon the property of the taxpayer.

The automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362, prevent a creditor from attempting to collect a pre-petition debt from a debtor who has filed under the bankruptcy laws. These provisions were enacted to provide for an orderly administration of the estate and to ensure that all creditors and claimants will share fairly in the debtor's assets. See, *e.g.*, *Hunt* v. *Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986); *Holtkamp* v. *Littlefield*, 669 F.2d 505, 508-509 (7th Cir. 1982); *Pursifull* v. *Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). Among other things, the automatic stay prevents a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *In re Frigitemp Corp.*, 8 Bankr. 284, 289 (S.D.N.Y. 1981), citing *Fidelity Mortgage Investors* v. *Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

In this case, the IRS levied not to collect taxes owed by the debtor, but to collect taxes owed by an individual holding an administrative expense claim against the estate. The individual's claim against the estate had already been allowed and the bankruptcy court had already authorized disbursement of the funds. The notice directed the trustee to pay to the IRS, rather than to the individual, the funds that the estate owed that individual.

Sending a levy notice to a bankruptcy trustee in these circumstances does not violate the automatic stay provisions of the Bankruptcy Code. As the Third Circuit held in rejecting a similar argument in *In re Quakertown Shopping Center, Inc.*, "[w]e are here on familiar ground" (366 F.2d at 98):

> In making a levy such as this the United States becomes in effect the involuntary assignee of the creditor. It does

> not invade the jurisdiction of the Bankruptcy Court or interfere with the administration of the estate. It merely serves notice on the receiver or trustee that whatever funds otherwise would be paid to the taxpayer shall instead be paid to the government as the distrainor, to the extent of the amount due it. We are here on familiar ground. A creditor may voluntarily transfer his claim against a bankrupt estate without obtaining the approval of the Bankruptcy Court. 3 Collier on Bankruptcy (14th ed. 1966), § 57.06. We deem the levy to be similar in effect to an assignment, albeit involuntary on the part of the creditor of the bankrupt.

Accord *In re Meter Maid Industries, Inc.*, 462 F.2d at 438.[3] As the *Quakertown* court recognized, the serving of the levy neither invades the jurisdiction of the bankruptcy court nor interferes with the administration of the estate; it is only after the court has approved payment to the claimant that the IRS seeks to have its levy honored. The debtor's estate is neither enlarged nor diminished by honoring the levy, and the debtor's rehabilitation is unaffected.

It is not a violation of the automatic stay to require the trustee to obey the revenue laws to the extent of honoring the federal tax levy on the funds awarded to the bankruptcy claimant. See note 2, *supra*. Several statutes expressly require the trustee to obey the tax laws. See 28 U.S.C. 960 (providing that all officers and agents conducting business under the authority of a United States court, a definition that includes bankruptcy trustees, are subject to all federal, state and local taxes to the same extent as if an individual

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[3] Both *Quakertown* and *Meter Maid* were decided under the Bankruptcy Act, prior to enactment of the Bankruptcy Code. As the court of appeals correctly concluded (Pet. App. 5-7), nothing in the Bankruptcy Code alters the applicability of those decisions to the question presented in this case.

or corporation were conducting the business); 26 U.S.C. 1398; 11 U.S.C. 346. As this Court has observed on two separate occasions, nothing in the Bankruptcy Code grants the trustee "*carte blanche* to ignore nonbankruptcy law." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 244 (1989), quoting *Midlantic Nat'l Bank* v. *New Jersey Department of Envt'l Protection*, 474 U.S. 494, 502 (1986).

2. Petitioner's fears regarding the scope of the decision of the court of appeals (Pet. 10-11) are unfounded and stem apparently from a misreading of that decision. The decision in this case will not generally prevent a trustee from enforcing the automatic stay provisions. Pet. 10. Only after the bankruptcy court has approved a payment to a claimant may the IRS levy upon it. Nor will the decision in this case impair a debtor's ability to exercise his statutory option of modifying his rehabilitation plan or converting his case under Chapter 7, as petitioner contends (Pet. 11). Since the IRS may not levy upon the funds until after their payment has been approved by the court, the debtor's ability to exercise these options is not "impaired" prior to confirmation; after confirmation, the IRS levy no more impairs the debtor's options than would the actions of a trustee who dutifully pays the claims promptly upon approval. In sum, an IRS levy reaches only the property of the taxpayer. If the bankruptcy court has not yet approved payment of the bankruptcy claim of the delinquent taxpayer, there is no property to which the levy would apply.

3. There is no conflict among the circuits on the issue presented by this case. The decision below is consistent with, and directly supported by, the decisions of the other courts of appeals. See *In re Quakertown Shopping Center, Inc.*, 366 F.2d at 98; *In re Meter Maid Industries, Inc.*, 462 F.2d at 438. See also *Clark* v. *United States*, 851 F.2d 104 (4th

Cir. 1988).[4] Further review of the decision in this case is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner argues (Pet. 13-15) that there is a conflict among various district and bankruptcy courts regarding the proper definition of the term "property of the estate" in 11 U.S.C. 362(a). As the court of appeals here concluded, however, it is unnecessary to address that question because the property subject to the levy is the claim of the creditor against the estate and not the assets of the debtor or the estate itself. Pet. App. 5-6. There is no conflict among the circuit or district courts on the question presented and decided by the court of appeals in this case.

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